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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; AND
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The interest of the Chamber of Commerce is set forth in the previously filed "Motion of the Chamber of Commerce of the United States for Leave to Intervene" in this case. Although this Court denied the Motion, the Chamber was permitted to participate as *amicus curiae* herein. Pursuant to Rule 42 of this Court, consents from all parties to this case have been obtained for the Chamber's participation as *amicus curiae.*

SUMMARY OF ARGUMENT.

This case presents the Court with two questions of major importance to great numbers of affected employers, employees and unions is areas where the parties and lower courts are without effective guidance.

The first of these questions relates to the appropriate criteria for determining when cases are (rather, are not) moot in the labor law field. The court below, faced with the substantive question as to the propriety of States' payment of welfare benefits to strikers, held this case moot because the strike had terminated during the course of litigation. In its analysis, the lower court adopted the view that in labor cases, apparently distinguished from cases arising in other areas of the law, the lack of need for relief in the case renders it inappropriate for judicial attention notwithstanding the facts that the question is of general public importance affecting many persons, is of a recurring nature, would otherwise repeatedly tend to evade resolution and would be earnestly litigated by genuinely adverse parties. Yet these very criteria, or some of them, have led other courts to conclude that cases are not moot in the labor law area as well as in others. Analysis of mootness decisions reveals, generally, that courts have sought to develop separate tests for separate kinds of cases, producing no clear direction, and rendering variables determinative in some cases which are deemed irrelevant in others. It is here submitted that a single test should govern the determination of mootness in all cases, and that test should consist precisely of the described factors which the court below declined to apply in labor cases.

The second question presented here is the substantive matter which gave rise to the mootness dispute,—the propriety of States' subsidies to strikers during the course of their strike. The *amicus* contends that in the National Labor Relations Act

a federal policy was created fostering free collective bargaining as the means by which parties should resolve their labor disputes. Free collective bargaining requires that the parties be left to their own resources of strength, initiative and resolve. Intervention by the State on either side of the parties' dispute constitutes a violation of the necessity for governmental neutrality which is basic to the federal scheme. States' payment of welfare benefits to strikers in order to assist them during their strike represents such an intervention on one side of the dispute in violation of the federal scheme and, hence, of the Supremacy Clause of the federal Constitution.

ARGUMENT

I.

WITH RESPECT TO THE DOCTRINE OF MOOTNESS.

The instant case presents an issue of enormous importance for the efficient functioning of the judicial system. The question whether, or under what circumstances, a case has become moot, —a question which can arise to plague any party in any case at any time with respect to any issue,—has produced a wide range of differing views, differing tests and differing results. Predictably, there has resulted an irreconcilable conflict among the circuits. Indeed, both the conflict and the confusion are so clear, that the divided court below expressly invited this Court's attention to the problem.

An appropriate consideration of this question depends, in turn, upon an awareness of the legal and policy conflicts to be resolved. In aid of this Court's deliberations, the Chamber sets forth its view of the antecedents of the problem and a proposed resolution.

A. The Nature of the Problem in the Analysis of Mootness.

The narrow question presented here is whether a case arising under the labor laws becomes moot and should not therefore further engage the judicial process when the immediate dispute which gave rise to it, although of a recurring nature involving matter of public importance, becomes resolved during the process of review.

In the analysis of this question, the generally cited bases for the mootness doctrine itself afford only limited assistance. In its broadest sense, mootness is one of the doctrines by which a court determines whether or not a matter before it may be properly adjudicated. It is a limitation on judicial power. Justiciability, an ill-defined concept relied upon to determine the

scope and limitations of the judicial power, is often thought of as a Constitutional stricture imposed by the "case" or "controversy" requirement.[1] However, the terms "case" or "controversy" are themselves vague and inherently capable of varying interpretation,[2] so that to say that a matter is not "justiciable" because it does not present a "case" or "controversy" is devoid of useful meaning. It is perhaps for this reason that mootness problems, which arise because the conduct complained of has ceased prior to appeal but is likely to recur, have posed a conceptual difficulty that has failed to evoke a consistent or predictable response.[3]

Aside from imprecise Constitutional limits, the *policy* bases for the mootness doctrine similarly offer limited assistance. Those bases have been described as a need to economize judicial endeavor and need to assure the fullest litigation of the issues,—an objective presumably best guaranteed by an existing "controversy."[4] In fact, both criteria are suspect. If an issue is of a recurring nature whose potential effect reaches many prospective plaintiffs or defendants, the greatest judicial economy will result from a decision which will put the issues to rest and obviate much future litigation. If the nature of the recurring issue involved is one which is inherently likely to be resolved prior to a reviewing court's decision on the merits, then a failure to decide it despite such a resolution will only result in proliferating litigation in which each case in turn is likely to become "moot" while the underlying dispute continues to avoid judicial scrutiny. Such a result produces the antithesis of "judicial economy." Similarly, issues of importance whose continuing future effects may be anticipated may well be more earnestly litigated by those, such as associations of potentially affected members, who

1. U. S. Const., Art. III, Sec. 2.

2. *Note*, Cases Moot on Appeal: *A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955); *Note, Moot Cases on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970).

3. See Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

4. Note, 103 U. Pa. L. Rev. 772.

foresee an impact on them of those future effects than by directly involved parties who may never see the problem again. That is, there is no inherently necessary connection between the existence of an unresolved dispute and a thorough and competent litigation of the issues.

How, then, should the determination be made as to whether a given case should engage the judicial process? Former Chief Justice Warren, in *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968), stated that justiciability is a concept designed to "limit the business of federal courts to questions presented in an adversary context and in a form capable of resolution through the judicial process."[5] This functional view of justiciability suggests that the conceptual problems involving application of the mootness limitation to the type of case here under consideration may best be resolved and consistency be achieved by analyzing justiciability in terms of the needs and objectives of the appellate judicial process rather than, as has been the case, in terms of the identity of those who seek to litigate the issues or whether a specific instance of a general and continuing controversy has been resolved by the parties.

Fundamentally, that appellate judicial process requires only that degree of adverseness of interest between litigants as will assure both the effective functioning of the adversary system and the effective resolution of issues of public importance. How-

5. Justice Frankfurter, concurring *Youngstown Sheet & Tube Co.* v. *Swayer*, 343 U. S. 579, 594 (1952) expressed a similar view in language which empasized the amorphous quality of the concept:

> "Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute 'cases' or 'controversies.' Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in conventional litigation. . . ."

What is the relationship between what may once have been "traditional" to what is now, in a vastly changed time, appropriate? How does one codify the "expert feel" of lawyers? And to the extent that the legal system adjusts to the needs of an ever more complex society, can the notion of "conventional litigation" remain constant?

ever, in making mootness determinations, courts have evolved a variety of theories which are in no way consonant with each other. We submit, with reference to the requirements set forth above, that clarity and uniformity in the application of the mootness doctrine can be accomplished without compromising the objectives and needs of sound judicial policy and specifically without subjecting courts to an undesirable or unavoidable flood of litigation.

B. The Differing Variables Which Have Been and Are Currently Employed by the Courts in Determining Whether a Case Is Moot.

In determining whether a case which involves an important and recurring question becomes "moot" when the immediate parties have adjusted their personal dispute prior to definitive judicial consideration of the issue presented, or when relief to the contending parties is otherwise inappropriate, courts have applied tests which are often artificial and have achieved inconsistent results.

In *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953), one of the most often cited decisions in this area, the defendants in an anti-trust suit voluntarily ceased the conduct complained of prior to final judicial review. The "mere possibility" that the challenged conduct might again recur was held to be sufficient to insure the presentation and vigorous litigation of issues necessary to proper adjudication and prevent the case from being "moot". This Court stated:

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." (Citations and footnote omitted.)

This proposition had been stated previous to, as well as subsequent to, *Grant*.[6] But it has not, however, been uniformly applied nor does its expressed rationale explain other decided cases.

Grant involved a *governmental* challenge to private conduct that had ceased prior to review, as did the authorities referred to in footnote 6, *supra*. The "mere possibility" of recurrence which precluded a finding of mootness there has not uniformly been applied to otherwise similar situations where it is *private* parties who challenge governmental conduct. Illustrative is *Oil Workers, Local 8-6* v. *Missouri*, 361 U. S. 363 (1960) the case upon which the lower court relied in finding the instant matter moot. In *Oil Workers*, a case brought by private parties, the State of Missouri seized certain struck facilities during emergency circumstances and enjoined any future strike. The Court there held that a repetition of that conduct was merely "speculative," and consequently held the case moot. But is there a difference between the "mere possibility" of recurrence and a "speculative" recurrence? It does seem clear that so long as one may speculate about recurrence,—i.e. it is not impossible, —then there is at least a "mere possibility" that the questioned conduct will be repeated. Curiously, in a subsequent case the same conduct involved in *Oil Workers* was repeated pursuant to the same alleged statutory authority,[7] illustrating that even when

6. *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 422 (1948); *NLRB* v. *Mexia Mills, Inc.*, 339 U. S. 563, 567 (1950); *NLRB* v. *Raytheon Co.*, 398 U. S. 25 (1970).

7. *Street Employees Div. 1287* v. *Missouri*, 374 U. S. 74 (1963); Se, also, an earlier case, *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360 (1919), which involved a seizure by the Postmaster General of the cable company's property during World War I. The possibility that a seizure might recur was held insufficient to afford the necessary personal stake. See, also, *A. L. Mechling Barge Lines* v. *United States*, 368 U. S. 324 (1961) where an ICC order was attacked because it was made without a supporting hearing or findings. The Commission promised that it would make findings in the future, but insisted it was not required to hold hearings. The case was held moot because the new practice of giving findings *"may* lead the Commission to provide for a hearing—at least under some circumstances." *Id.*, at 331. These cases, brought by *private parties* to protest government conduct, represent an avoidance or rejection of the "mere possibility" test.

a future similar injury to claimed interests is only "speculative" it remains "possible." In any event, it would appear that the same degree of likelihood of recurrence which prevents a finding of mootness in suits brought by the government *(Grant)* has resulted in findings of mootness in suits brought against the government by private parties *(Oil Workers).*

The conceptual basis for this disparate treatment may result from an unstated assumption that a private party has an insufficient stake in a recurrence of conduct involved in his suit, conduct to which he might never again be subjected, to warrant reliance upon him to constitute an effective and interested litigant for the future. In cases such as *Grant,* on the other hand, where the government challenges private conduct in its law-enforcement function, the government's future adverse interest may presumably be relied upon; that is, it will continue to enforce the same statute or rule in the same manner against future violators. According to this analysis, in suits brought by private parties the avoidance of mootness requires a greater likelihood of recurrence than "mere possibility". At least one student of this Court's opinions has so concluded.[8]

Unfortunately, this analysis explains only a portion of the relevant cases. Thus, in *Gray* v. *Sanders,* 372 U. S. 368 (1968), this Court expressly applied the "mere possibility" test articulated in *Grant* to a *private* challenge of governmental conduct. *Sanders* was a voter class action challenging a Georgia state statute governing primary elections. The election officials did not follow the statutory plan for the primary in question, and the election was held. In holding the case not moot, this court applied the *Grant* test. The meaning of that case is not entirely clear, however; while the Court's language followed *Grant,* the certainty that the Georgia voters would be adversely affected by any return to the challenged plan would presumably also satisfy the impliedly more stringent *Oil Workers* criteria.

8. This explanation for the described disparate treatment appears to be adopted in *Note,* 83 Harv. L. Rev. 1672 (1970).

Adding to the difficulty of assessing the import of *Sanders* is the contention, according to the court below and at least one legal scholar,[9] that the explanation for the *Sanders* cases lies, instead, in the fact that election cases constitute a separate subgroup for mootness purposes. Under that view the relevant variables to be examined in mootness cases has swelled: Is the Government involved? Who is the plaintiff? What is the degree of likelihood of recurrence of the challenged conduct (differing in effect depending upon who the plaintiff is)? And what kind of case is involved?

As the variables employed by courts have proliferated, it can be seen that the area has taken on a needless and burdensome complexity. Moreover, this Court has never expressly held election cases to represent a separate class and an analysis of such cases yields no evidence of such an intent. *Moore* v. *Ogilvie*, 394 U. S. 814 (1969) involved a *private party's* challenge to the validity of a statute whose provisions were interpreted by state authorities effectively to deprive the challenging party of an opportunity to run for elective office. By the time the case reached this Court the election had already taken place. Nonetheless the case was held not moot. This Court could not realistically say that the challenged conduct would with certainty affect the challenging party in the future. On the contrary, one could only "speculate" whether he would again run for elective office. Rather, the case was deemed non-moot because it involved an important public question which would affect *other* similar private parties in the future since the same governmental agency would presumably continue to interpret the same statute in the same manner. Either *Moore* is an illustration of a separate sub-group of mootness cases or,—by avoiding exclusive reliance on the *Grant* and *Oil Workers* terminology and focusing instead on the likelihood of future injury to other then-unaffected private parties,—*Moore* effected a change in mootness law generally.

9. Note, 130 U. Pa. L. Rev. 772.

In contrast to *Moore*, which involved an inherently likely recurring effect of challenged conduct on a group which might or might not include the plaintiff himself, this Court declined to review the merits of two other election cases, *Brockington* v. *Rhodes*, 396 U. S. 41 (1969), and *Hall* v. *Beals*, 396 U. S. 45 (1969). *Brockington* and *Hall* involved situations in which the complaining party sought to have his name placed on the ballot as a candidate for a particular election (*Brockington*), and sought to be permitted to vote in a particular election (*Hall*), but was prevented from doing so pursuant to the operation of a statute which had subsequently been amended. By the time these cases reached this Court, the statutory amendments had been effected and the specific elections involved had been conducted. These cases were held to be moot since a repetition of the kind of injuries complained of could not recur in view of the statutory amendments. That is, in practical terms, no conceivable interest of either the individual complaining party or any others similarly situated could possibly be infringed in a similar manner in the future.

Reading the *Moore*, *Brockington* and *Hall* cases together, it is reasonable to deduce that this Court has effected a departure from the various tests previously followed in *Grant*, *Oil Workers* and *Sanders* and now relies, in mootness cases presenting important public question, on whether it is *possible* that certain challenged conduct will recur to the *private* plaintiff *or* the class of persons to which the plaintiff belongs. Conversely, the former cases may be read to merely create an additional basis for deciding a case on its merits when the future jeopardy to that class is "inherently likely" even though the prospective jeopardy to the private plaintiff himself may be merely "speculative." Finally, one may read *Moore*, assuming again that it is not merely representative of a special sub-group of cases, to give more specific meaning to *Oil Workers* in defining the degree of likelihood of recurrence which avoids mootness when *private* parties bring suit.

Nor do these authorities and possibilities exhaust the variables which courts' decisions have relied upon in determining whether cases are moot. In addition to the various approaches discussed above, which are based on assessments of probability of future effect, courts have declined to find a case moot when the challenged conduct is deemed "capable of repetition, yet evading review." In *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911), this Court employed the quoted language as a basis to uphold a *private* challenge to governmental conduct where there was no certainty or even inherent likelihood—but only a "mere possibility" that the challenging party would again be subjected to an injury such as he was then challenging. Indeed, the Court's focus was not at all on the degree of predictable future jeopardy to the plaintiff itself but rather on the need of the judicial system for a resolution of a problem which would otherwise continue to escape judicial scrutiny. It should also be noted that to still another legal scholar the doctrine of *Southern Pacific* is said to be restricted to those cases which involved recurring situations *without* regard to the identity or nature of the plaintiff and without regard to *his specific* problem.[10] In either event, *Southern Pacific* was concerned with the needs of the judicial system for means by which to resolve problems; it was not primarily concerned with any requirement to satisfy the criteria relied upon in the other mootness cases discussed *supra*.

The reasoning of *Southern Pacific* would also seem to underscore this Court's decision in *Sibron* v. *New York*, 392 U. S. 40 (1968). That was a criminal case in which a *private* challenge was mounted to an alleged improper police search. The Court's conclusion of non-mootness in that case could not be said to trace to a concern that the challenging party was "inherently likely" to be again affected by the same wrongful conduct or that the probability of such a recurrence was, as to him, more than "speculative." Rather, the Court was concerned that

10. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

the substantive issues presented in the case had a great potential impact on others and, unless adjudicated, would continue to evade judicial review.

Whatever the difficulty of reconciling the latter two decisions with *Moore*, *Oil Workers* and the "mere possibility" test of *Grant*, the task is compounded by the view of at least one commentator[11] that criminal cases such as *Sibron*, like election cases, constitute an independent area whose mootness rules may not be imported to the analysis or resolution of such issues in other areas of the law.

Coming now to the instant proceeding, this case presents a particularly apt illustration of the problems of the entire area. The underlying substantive question herein is one of substantial public importance, involving the propriety of a State's payment of public welfare funds to striking employees. Since strikes will continue to occur, the substantive dispute will therefore recur with certainty; states will continue paying benefits to strikers and unions' and employers' bargaining relationships will continue to be affected by the favorable or adverse impact, respectively, of such payments on the process of decision-making. While there is at least a "mere possibility" that the issue will again confront the immediate parties (*Grant*), there is an "inherent likelihood" (*Moore*) that the class of persons, i.e., employers, to which the *private* plaintiff belongs will be affected by a recurrence. Since the duration of a strike is unlikely to be sufficiently protracted to survive the appellate process, the question presented is short term in nature, "capable of repetition, yet evading review." (*Southern Pacific*). Thus, while the instant case would seem not to be moot under a variety of tests applied in a variety of cases, yet the court below, relying on *Oil Workers*, dismissed the case as being moot because the specific strike which gave rise to the entire action had terminated.

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11. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970).

While recognizing that the law of mootness has undergone substantial liberalization and that the instant case would not appear to be moot on the strength of recent decisions such as *Moore*, the court below nonetheless held it moot on the premise that in *labor relations cases*, the discontinuance of the challenged conduct necessarily results in mootness. Thus the court below segregated still another area from the mainstream of mootness law and created yet one more independent sub-group. Moreover, the court below rendered the mootness law in labor cases unique in that it would be *only* in such cases that the discontinuance of the underlying dispute automatically rendered a matter moot irrespective of other variables employed in other cases or other areas of the law. *Oil Workers* cannot reasonably be read to warrant such a result; nothing in that case requires a distinction between the mootness rules in labor cases and those which are appropriate in any other category or type of case.

Accordingly, adding to the confusion of the superabundance of tests and variables which may be derived from prior decisions of the courts in mootness cases, the court below added a further basis for legal distinction upon the apparent authority of this Court's decision in *Oil Workers*.

C. Evaluation of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal for Analyzing Mootness.

The various approaches which courts have used to determine whether one has a sufficient interest in the resolution of an issue, as divorced from its particular factual context, to prevent a finding of mootness have yielded the described inconsistency and uncertainty. They afford no rational basis for determining whether a case will be fully, competently or vigorously litigated. There is no warrant in logic or sound policy for applying one test in election cases such as *Moore* or criminal cases such as *Sibron*, applying a wholly different test in labor disputes such as *Oil Workers*, a third test when the government challenges private

action, and a fourth test when a private party acts as plaintiff. There is no assurance that the self-interest necessary to achieve vigorous litigation will obtain in one type of case rather than another. Further, the assessment of the plaintiff's *personal* stake in terms of probability of recurrence of challenged conduct does not explain the courts' adjudication of issues of public importance.

This public interest aspect is inherent in *Southern Pacific*, *Moore* and *Sibron*. It forms the basis for courts' need to determine issues of compelling importance which might otherwise evade review. Thus, where the issues raised involve significant questions that ought to be resolved, the requirement of probability of effect has been adjusted to allow resolution. Further, a number of lower federal courts have apparently adopted a public interest exception where, even though a case would otherwise be moot, the issues are of sufficient importance that they compel judicial resolution.[12] If the issues raised in a case are sufficiently important that they affect a broad category of persons and are likely to recur, there is no sound basis for rejecting an appeal because the appellant is unable to demonstrate for a certainty that a recurrence will affect him.[13]

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12. See, e.g. *Friend* v. *United States*, 388 F. 2d 579, 581 (CADC, 1967); *Dyer* v. *SEC*, 266 F. 2d 33, 47 (CA 8); *cert. denied*, 361 U. S. 835 (1959); *Boggess* v. *Berry Corp.*, 233 F. 2d 389, 391 (CA 9, 1956); *contra, Campbell Soup Co.* v. *Martin*, 202 F. 2d 398, 399 (CA 5, 1953). While this Court has indicated the relevance of the public interest in mootness determination, see, e.g., *Grant, supra; Moore, supra; Sibron, supra*, it has not expressly relied on the "public interest" as the sole basis for determining the question of mootness. *Street Employees Div. 998* v. *Wisconsin Employment Relations Board*, 340 U. S. 416, 418 (1951).

13. The "public interest" component of the mootness doctrine has had great appeal to commentators in this area:

> "Not easy to weight, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the decision could have no substantial effect on the parties who originally raised the question and that its usefulness would, as a result, be largely confined to the creation of precedent." (Citations omitted) (Note, *"Moot" Administrative Orders*, 53 Harv. L. Rev. 628, 630 (1940)).

The nature of the "interest" which a plaintiff should be required to possess in an issue to overcome a suggestion of mootness when relief in his case is otherwise inappropriate should be determined without reference to the continuum of probability-of-future-effect which courts today use as a test. That is, whether a recurring issue should be resolved by the courts ought not to depend upon the need for courts to measure the shades of differences between situations where such recurrence is "speculative," or "merely possible," or "probable," or "inherently likely" or "certain." Rather, it should be recognized that since self-interest is the motive which insures the proper functioning of the adversary judicial process, the fact that the appellant seeks to expend the time, money and effort to prosecute an appeal constitutes adequate assurance that he will litigate the issues with vigor. His self-interest may be based upon his own appraisal of the probability that a recurrence of the conduct complained of will affect him adversely. Perhaps it may be based on an identity of interest with those similarly situated. In some instances it may reflect an association's efforts to protect its members' interests from future jeopardy.[14] In any event, recognition of this principle reflects the realities of much present day litigation challenging governmental action and, rather than diminishing the quality of litigation, serves to enhance it.[15]

Recognition of the legal adequacy of the personal stake of an appellant who, for whatever reason, perceives a sufficient self-

14. That such associational participation on its members' behalf demonstrates an interest sufficient to overcome objections to the adverseness principle was apparently recognized by the First Circuit in *Grinnell* v. *Hackett*, 475 F. 2d 449, 82 LRRM 2986 (1973), which involved the same underlying substantive issue as is presented by the instant case. In *Grinnell* the Chamber was allowed to intervene, and thus prevent mootness, because it represented "many other employers . . ., as to at least some of whom the issue is certain to recur." *Id.*, at 2989-90.

15. This interest has been recognized by Professor Jaffe in his argument that "ideological" plaintiffs who challenge governmental action merely as concerned citizens should be accorded standing. See, Jaffe, *The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

interest to warrant prosecuting an appeal, does not destroy the necessary adversity required for vigorous litigation. Where the issue is important and there is a possibility of recurrence of the disputed conduct, the government, as defender of its actions, has an equally sufficient interest in presenting a well-argued case as it does when it is functioning as prosecutor;[16] it is surely just as important that the government refrain from unlawful conduct as it is that private persons do so. Since any unlawful activity engaged in by the government in the administration of a public law is bound to affect a large class of people and thus raise important issues, vindication of the public interest by private parties should not depend on the uncertainty engendered by differing tests of relative probability of recurrence. An even-handed and consistent application of the *Grant* test to all plaintiffs in all areas of the law would accomplish this end.

Although the mootness doctrine in "recurrence" cases is inconsistently applied, there is one policy thread that runs throughout. In cases determined not to be moot, the real concern of the courts has seemed to be the avoidance of the potential for continuous litigation of the same issues when those issues affect large segments of the public. This concern is manifested in the cases as an expression of the "public interest". While cases which have been found not to be moot can be read to share this concern, there are other cases, however, which have been held moot (such as *Oil Workers, supra*) which would appear to have warranted a different result for these same reasons.

This concern for the resolution of issues of public interest resulted in a finding of "justiciability" in the first "recurrence"

16. When the challenged conduct is engaged in by the government it is more than likely to recur absent a judgment condemning it as unlawful. The possibility that the issue in question will recur insures that the government, as defender of its policies, is a recurrent litigant who will be aware of the impact that an adverse determination will have on its future activities. Its adverse interest is thus assured. See, e.g. *Carroll* v. *President & Commissioners of Princess Anne County*, 394 U. S. 175 (1968).

case, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897). *Trans-Missouri*, the conceptual progenitor of *Grant, supra*, involved an anti-trust action in which the government sought dissolution and injunction. During the pendency of the appeal, the defendant voluntarily dissolved. The Court held the case not to be moot saying:

> "There mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the legality of the agreement itself for the carrying out of which the association is formed . . ." *Id.*, at 308.

The defendants were enjoined from re-combining in the future. This is significant because the theory prevalent at the time was that mootness was a remedial concept, and where this Court could not render an effective decree, the matter was moot.[17] In *Trans-Missouri* there was nothing to enjoin since the defendants had ceased their allegedly unlawful combination, and the Court's decree would have no effect. However, the Court was concerned with the possibility that the "defendants would, by a series of successive re-combinations and dissolutions, engage the government in continuous litigation so that the 'rights of the public' in obtaining judicial resolution of the underlying issue would be thwarted." *Id.*, 305-6, 309-10.

Similarly, in *Southern Pacific, supra*, this Court emphasized the importance of judicial review to all carriers who might possibly be affected by the ICC's policy of promulgating short-term orders. And in more recent cases, this concern is more manifest. In *Sibron, supra*, the Court expressly stated that it was concerned with ". . . the vital importance of keeping open the avenues of judicial review . . .", *Id.*, at 52, and in *Moore, supra*, where the underlying issue required resolution because it reflected a ". . . continuing controversy in the federal-state area . . .", *Id.*, at 681.

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17. See *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696 (1891); *Ex Parte Baez*, 177 U. S. 378 (1900).

In fashioning a rule which may predictably be applied in cases raising a question of mootness, the policy determinations expressed in *Southern Pacific*, *Sibron* and *Moore* should be superimposed upon this Court's requirement, as expressed in *Flast* v. *Cohen*, *supra*, that justiciability is intended to insure that

> ". . . the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought capable of judicial resolution." (at page 106.)

In short, it is posited here that the proper application of the mootness doctrine demands an examination of the following criteria in cases where the immediate parties to the proceeding have adjusted their dispute prior to judicial consideration of the case or specific relief is for any other reason then inappropriate. Such cases should not be deemed moot only when each of the following tests is satisfied:

1) Whether the issue to be decided is one of general importance, affecting broad segments of the public or a substantial group represented by the plaintiff or membership represented by an association; that is, whether by settling a significant Constitutional, statutory or other legal question the court will so resolve the conflicting claims of right between the numerous groups of affected persons as to render unnecessary much future litigation concerning the existence or nature of such adjudicated rights;

2) Whether the issue is one which may recur; "mere possibility" of recurrence should be the only relevant measure of continuing probability of effect;

3) Whether there exist some parties to the proceeding who are willing and prepared to litigate the opposing merits of the issues thoroughly, vigorously and conclusively; and

4) Whether the proceeding involved, at its inception, a genuine dispute among legitimate contending parties where some injury was suffered or threatened as a consequence of challenged conduct.

If these criteria are satisfied,—that is, the issue arose in a legitimately adverse context and is worth deciding on its merits, may recur to jeopardize others' interests and will be earnestly litigated,—then courts should proceed to an adjudication of that issue. Restricted to these variables, the analysis of mootness cases will be freed from the current excess of tests and categories and will afford a measure of predictability without loss of courts' flexibility within the confines of these proposed criteria to make such judgments as appear appropriate in the case at hand. Under these tests, cases of genuine and far reaching significance which warrant judicial attention will not be deprived of decision because, while the propriety of challenged conduct has not been resolved, the conduct itself has ceased. Similarly, it will become clear that the appropriate litigants in such cases will be any persons actually affected by the substantive question involved, whether they be individuals or groups, named plaintiffs or others who intervene because of the potential advantage or jeopardy promised or threatened as a consequence of the litigation.[18] And the standards will be applied uniformly to all who meet the stated criteria, without regard to what is in these cases the artificial distinction between private and governmental parties. A further meritorious consequence of the adoption of the proposed tests will be to eliminate special rules for special sub-classes of cases, whether election cases, criminal cases or labor relations cases. There is no inherent necessity, for example, for treating labor cases differently than any others for purposes of determining mootness.

18. The propriety and value of organizations such as the Chamber functioning to protect their members' interests and thereby preventing cases from being held moot because of the continuing jeopardy to *some* members of the organization has been noted and approved in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972) and *Grinnell Corp.* v. *Hackett*, *supra*.

For the questions presented in labor relations cases are of no less major consequence than those presented in any other field, no less infrequently present Constitutional problems and balancing requirements between statutory and Constitutional rights, recur no more infrequently than major issues in other areas, are no less prone to associational representation of members' interests and are no less earnestly pursued and litigated in the courts. On the contrary, arguments may well be advanced to demonstrate that in the often highly-charged atmosphere of labor relations the degree of parties' concern and need for the settlement of potentially difficult future questions is more intense than may be typical elsewhere.[19]

While the adoption of this proposal would generate important advantages to the efficient and logical development of the judicial process, there would be no danger of opening the judicial flood-gates to a greatly increased volume of cases. The proposed tests contain sufficient internal limitations for this to occur. Thus, any case which fails to commence in a genuinely adverse context or which fails to involve important principles of general relevance and wide application or, however interesting, does not involve some likelihood of recurrence will not engage the judicial process. The proposed formulation is basically an ordered limitation of judicial access; any case which survives its terms ought to be decided by the courts. Its adoption would result in a doctrine which would be more readily and logically understood and applied in labor relations and elsewhere.

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19. The underlying substantive issue presented below has given rise to substantial recent litigation demonstrating its significance as an issue, its recurring quality and the willingness of those who are and who may be affected by such recurrence to litigate the matter. See, *e.g., ITT* v. *Minter,* 435 F. 2d 989 (CA 1, 1970); *Grinnell* v. *Hackett, supra; Almacs* v. *Hackett,* 311 F. Supp. 964 (D. R. I., 1970); *Francis* v. *Davidson,* 340 F. Supp. 351 (D. Md.), *aff'd. per curiam,* 409 U. S. 904 (1972); *Russo* v. *Kirby,* 453 F. 2d 548 (CA 2, 1971); *Dow Chemical Co.* v. *Taylor,* .... F. Supp. ...., 57 F. R. D. 105 (1972); *Lascaris* v. *Wyman,* .... N. Y. .... (1973), cert. den. 94 S. Ct. 165 (Oct. 9, 1973); *New York Telephone Co., et al.* v. *N. Y. Dept. of Labor,* No. 73 Civ. 4557 (S. D. N. Y., *pending*).

"If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity."[20]

D. There Exists an Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decisions Which Would Be Resolved by the Adoption of the Previously Proposed Ordering and Synthesis of Mootness Criteria.

The adoption of the mootness tests proposed above would promote harmony and uniformity in mootness analysis in the labor field in place of courts' current disharmony and diversity.

As has been previously noted herein, the court below, while conceding great doubt and inviting this Court's guidance, held the instant case moot because the union's strike had been discontinued prior to judicial consideration of the strike-related issue which gave rise to the suit. This result was said to be required by the fact that in labor relations cases the absence of a viable dispute rendered a case moot irrespective of the existence of other variables or criteria which would lead courts to hold otherwise in fields other than labor law.

At the outset, that view of the function of mootness in labor relations cases, though premised on the assumed holding of this Court in *Oil Workers,* is in conflict with a substantial number of cases also decided by this Court in the same labor field and in which a decision on the merits had been rendered although the challenged conduct had ceased long before. Among such

20. Comment, 83 Harv. L. Rev. 1672 at 1692 (1970).

decisions are *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 442; *NLRB* v. *Mexia Mills, Inc.*, 339 U. S. 563, 567; *NLRB* v. *Raytheon Co.*, 398 U. S. 25; and *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *NLRB*, 357 U. S. 93. In the last cited case, for example, a union which had been charged with engaging in unlawful picketing had agreed to cease such conduct after the filing of those charges but prior to the issuance of any formal administrative Complaint. The union had, moreover, as part of its cessation of unlawful conduct, fully settled the case with the complaining employer and had executed a collective bargaining agreement containing an explicit pledge not to resume striking. To the contention that the case was moot this Court disagreed and held ". . . the controversy was not rendered moot . . . we cannot say that there was no danger of continued violation."

Similarly, the Courts of Appeals have regularly adjudicated labor issues over objection that the parties' settlement of their dispute or the cessation for other reasons of the alleged improper conduct rendered the cases moot. Illustrative cases include *NLRB* v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961):

> "Nor can we adopt the suggested dismissal of the petition as now presenting only an academic question inasmuch as the pickets have long since been withdrawn.";

NLRB v. *Local 182, IBT*, 314 F. 2d 53 (CA 2, 1963); *NLRB* v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962); *NLRB* v. *Globe Wernicke Systems Co.*, 336 F. 2d 589 (CA 6, 1964):

> "Abandonment of an unfair labor practice does not cause the controversy to become moot.";

NLRB v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963):

> "If the court makes no decision as to the Respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."

The Third Circuit itself, in contrast to its decision herein, declined to hold a case moot on application for an injunction by the National Labor Relations Board despite prior full compliance with all aspects of the Board's remedial order. *NLRB* v. *Local 65, Carpenters Union*, 318 F. 2d 419 (CA 3, 1963). The latter case was one in which the *government* was the moving party. Lest it be assumed that this factor militates against the conclusion that the Third Circuit itself has rendered inconsistent decisions in this area, this Court's attention is directed to another Third Circuit opinion which was issued *subsequent* to the instant case and which involved two opposing *private* parties. In *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co. et al.*, ... F. 2d ....., 83 LRRM 2349 (decided May 29, 1973), that court held that the appellant-unions' appeal from the district court's denial of an injunction to restrain the employer's reduction of number of work shifts pending arbitration was *not* moot despite the fact that the parties' dispute had since been resolved through arbitration. The court held that ". . . this appeal is not moot because the issues involved are 'capable of repetition yet evading review' ". In its decision, the court failed to mention, much less distinguish, the instant case decided shortly before.

In order to highlight the conflict which afflicts this area, this Court is referred to still another Third Circuit decision in which the court held moot a *private* party's appeal of a district court's improper limitation of its participatory rights under Section 10(l) of the National Labor Relations Act. *Samoff* v. *IAM, Lodge No. 1*, 420 F. 2d 952 (CA 3, 1969). The court's decision holding the appeal to be moot was premised on the settlement of the dispute which gave rise to the proceedings in which the appellant wished to exercise a participatory role. *Samoff* would thus appear to be consistent with the decision below but inconsistent with a dissimilar panel's subsequent holding in *Pittsburgh Press.*

However, shortly after *Samoff* was decided the identical factual and legal situation arose in the Eighth Circuit. *Terminal*

Freight Cooperative Assn. et al. v. *Solien,* 440 F. 2d 124 (CA 8, 1971). The Eighth Circuit reached a contrary result:

> "In [*Samoff*], the Third Circuit held the execution of a collective bargaining agreement mooted an appeal on a similar issue. We are not disposed to follow this holding as we think it is contrary to the teaching of the Supreme Court in *United States* v. *W. T. Grant Co.* . . ."

In further explication of its holding,—in a case brought by *private* parties protesting an alleged breach of rights guaranteed under the labor laws,—the Eighth Circuit expressly relied on mootness doctrine which had arisen in non-labor areas in suits brought by the government:

> "We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the 'mere probability' test articulated in *United States* v. *W. T. Grant Co.* . . . In our view, a case is justiciable 'if there is a probability that the challenging party will be affected should recurrence take place' . . . We believe that the doctrine of mootness should not be used to perpetually frustrate review of issues of public importance arising in otherwise justiciable cases . . ." (Quoting Comment, 83 Harv. L. Rev. 1672, 1692)

In summary, there can be no serious argument with the proposition that the law regarding mootness, both in labor relations cases as well as in other fields of law, is in serious disorder. There is authority supporting altogether inconsistent results and a demonstrable and irreconcilable conflict among the circuits themselves. This result is presumably traceable to the fact that so many different tests for different circumstances are inferable from the decided cases. It is submitted that the adoption of a single set of criteria for all fields and all classes of litigants is needed and is desirable. The criteria suggested herein would appear to harmonize the principal authorities of this Court, would permit essential flexibility while affording useable guidelines and would promote order and predictability.

II.

THE MERITS OF THE UNDERLYING DISPUTE.

The Chamber supports the view of the petitioner herein that payment by States of welfare subsidies to striking employees is incompatible with the federal regulatory scheme as contained in the National Labor Relations Act. Such payments by the States violate the Supremacy Clause of the Federal Constitution in that they intrude into and disrupt the free collective bargaining relationship which the Labor Act intended should be the means by which parties mutually resolved their labor disputes.

Section 1 of the Labor Act provides that

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . ."

The meaning of the federal scheme for dispute resolution in the labor arena, a field occupied by federal regulation, has been clarified by this Court. Thus, according to *N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477, 489 (1960), the federal scheme provides that parties' bargaining relationship involves a "brute contest of economic power." That the parties must be left to a contest of their *own* economic weapons and resources is a necessary consequence of the observation in *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970), that ". . . the results of the contest [are left] to the bargaining strengths of the parties."

It is, thus, fundamental to the federal statutory scheme that in a dispute in labor relations there shall be no public interference in the private parties' bargaining relationship. This is an injunction which applies unquestionably to the States:

> "For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of

> Federal policy as if the State were to declare picketing free for purposes of or by methods which the federal Act prohibits."[21]

The Chamber submits, therefore, for these reasons as well as those which are contained in the petitioners' brief, that subsidies paid by the State to striking employees violates the Congressionally created necessity for neutrality in private collective bargaining, interferes with this Court's determinations that labor disputes should be settled according to the play of the combatants' resources and thus violates the Supremacy Clause of the federal Constitution. As a matter of law and policy, collective bargaining is a system of economic tension predicated on the parties' respective strength and resolve. Artificial supports to one side or the other, —whether by governmental subsidies to management or welfare payments to strikers, —constitute proscribed intrusions inconsistent with the Congressional design and the Constitutional provision which renders the federal scheme paramount.

The issue of the propriety of such welfare payments to strikers is one which this Court should resolve in this case. While the court below declined to do so when it held the case moot, all of the vital preconditions for a decision of that question are satisfied.

First, the question presented raises a matter of law for which it does not appear that an extensive factual record is warranted. The parties' dispute concerns their disagreement as to whether the federal scheme does prohibit a governmental source giving aid to one of the parties to a strike where the aid is premised on the existence of that strike. What is involved is *not* a question as to whether aid given independently of the existence of the strike should be discontinued because of or during the strike. Rather, the aid involved is given solely in order to afford assistance to the recipient during his strike. The purpose of the State's payments are not in dispute. Given the agreed

21. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953).

nature and purpose of this assistance, the federal scheme of the Labor Act as it has been elucidated in *Insurance Agents* and *H. K. Porter*, and the judicially approved injunction against State's interference in this federal area as described in *Garner*, the manner in which these factors interrelate constitutes a matter of law which this Court can now resolve.

Second, the need for such a resolution is beyond question. Within the last few years the issue has arisen in a variety of courts and, so long as States continue to make such payments, similar cases will continue to arise.[22] A question which will necessarily frequently recur, involving the need to resolve a conflict between sovereignties and an interpretation of the breadth of the federal labor laws is worthy of this Court's attention. Indeed, even should this Court decline at this time to effect an ultimate determination of this issue, some guidance could appropriately be given to those many courts which will continue to be confronted by the problem and by the competing Constitutional and statutory claims which the contending parties will urge. Direction with respect to the nature and scope of appropriate proof will, at minimum, produce an ultimate judicial economy and more direct and speedy resolution of this important matter.

Third, this case is not moot and, in accordance with the principles developed in the first part of this brief, the case represents a particularly apt illustration of a matter ripe for decision by this Court.

The first major criterion in an analysis of mootness relates to the general importance of the question presented and the range of its effect. As noted above, the issues involved here raise substantial statutory and Constitutional questions going to the heart of the federal labor scheme and its impact on State conduct. The extent of the interest which has been generated by these matters is evidenced by the volume of litigation which has been spawned by attempts to resolve them. Without doubt, a

22. See footnotes at pages 19, 20 of Petitioners' Brief.

decision on the merits by this Court will put to rest uncertainties in the law and much further litigation. The related test of frequency of recurrance is also met. Moreover, recurrance in this area is a multi-facted variable. Unions will surely continue to strike and States, barring prohibition by this Court, will continue to make payments to strikers as they have in the past. In addition to such measures of continuing future effect, however, there must be added the disruption of the parties' collective bargaining relationship. For the possibility of strike-related benefits will continue to exert some inducement to unions or employees to risk the consequences of a strike and thus affect their determination to adhere to hard positions. Similarly, the fact that such benefits would be paid their striking employees cannot but also exert a major effect on employers who measure their own bargaining positions and the consequence of a strike's prolongation due to the assistance given strikers by the State. Thus, the practice of States to make such payments results in an intrusion into the parties' collective bargaining relationship of factors entirely extrinsic to the dispute itself or the parties' strength or will; it creates an unwarranted dislocation in the free play of economic forces and amounts to an intervention on one side of the dispute.

The third principal variable in mootness analysis involves the requirement that there exist parties prepared and willing to litigate the issues thoroughly, vigorously and conclusively. The fact that the petitioner has brought this case to this Court is itself evidence of the satisfaction of this criterion. However, beyond the petitioner, the involvement of the Chamber assures such a thorough and conclusive litigation. For the Chamber has repeatedly and intensely sought to obtain a resolution of the question presented herein on behalf of its membership. To that end, it has been the Chamber which, *as a party*, has litigated the matter in *Dow Chemical Co.*, *Grinnell*, and *Russo*, *supra*. As the Chamber has indicated in its pending Motion for Leave to Present Oral Argument, the certitude that the question presented will continue to affect the Chamber's members in the future

renders the Chamber, in its representative capacity, more a party in interest in this case than the named parties, and assures the necessary adverseness and thoroughness of the litigation.[23]

Finally, although the strike which gave rise to the filing of this case has, during the appellate process, been terminated, the case did involve at its inception a genuine dispute among legitimately adverse parties threatening actual jeopardy as a consequence of challenged conduct. This consideration, in combination with the other criteria discussed above, establish that the case is not moot and should engage the judicial process in a resolution of the important and recurring issue presented.

23. The nature of the Chamber's interest in the substance of the welfare-for-striker question led the court below to observe that the Chamber, an *amicus*, was the real party in interest in this case; this consideration also led the court in *Grinnell, supra*, to hold that case not moot in reliance upon the recurring jeopardy faced by the Chamber's members from States' grant of welfare benefits to strikers.

CONCLUSION.

For the reasons stated herein, together with those additionally argued by the petitioner, the Court is urged to reverse the court below with respect to the question of mootness and to reverse the District Court with respect of the propriety of States' payment of welfare benefits to striking employees.

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